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## **Scotland's Constitutional Future: Interdependent independence or independent interdependence?**

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**Abstract**

Scotland's urgent constitutional question, which will be addressed in a referendum in the autumn of 2014, challenges many conventional assumptions about what is at stake in the struggle over sovereign authority and political identity, and about how that struggle might be treated and resolved. This essay investigates that challenge

**Keywords**

sovereignty; Scotland; referendum; independence; devolution; EU; multi-level governance; identity

# **Scotland's Constitutional Future: Interdependent independence or independent interdependence?**

**Neil Walker**

Scotland's urgent constitutional question challenges many conventional assumptions about what is at stake in the struggle over sovereign authority and political identity, and about how that struggle might be treated or resolved. My essay investigates that challenge.

## **1. A New Geopolitical Landscape**

In his fascinating study of the global impact of the American Declaration of Independence (Armitage, 2007), David Armitage alerts us to the distinctive political grammar of the modern world. He demonstrates how the famous 1776 Declaration was more than the collective self-assertion of one fledgling community – or community of communities - seeking to free itself from the colonial yoke. It was, in addition, the keystone of a new kind of global architecture. The Declaration was, of course, primarily addressed to the nascent American people, but it also sought and found a planetary audience. Its message reflected and reinforced the notion that national sovereignty – the governing idea of the emerging state system – possessed a double aspect. Sovereignty referred, in its internal orientation, to the idea that independent statehood should be consecrated in an act or process of popular self-authorization. It involved an exercise of constituent power by which ‘the people’, typically through a constitutional scheme, mandated a comprehensive

framework of self-rule. But sovereignty also referred, in its external orientation, to the necessity, if independent statehood was to mean what it said, that it be recognised by all other powers. These other powers would be required both to acknowledge the distinct title of the American people to participate in international relations as a newly independent state and to commit themselves to non-interference in the internal affairs of that new state.

Yet the Declaration acquired a broader global resonance. The Americans not only sought recognition for themselves. They also offered a model for general use. In proclaiming their 'separate and equal Station' as one of the 'Free and Independent States among 'the Powers of the Earth', the Declaration's framers encouraged many other aspiring states over the following two centuries to adopt the same template. Popular self-determination was presented as a universally valid claim, and sovereign statehood treated as a 'Station' available to all nations. And crucially, the very quality of sovereignty as a title to authority that was both (internally) comprehensive and (externally) exclusive, meant that there need be no contradiction, at least in principle, between the full satisfaction of the particular claim and the notion that all were similarly entitled.

Of course, principle is far from everything in international politics. The idea of a global order of mutually exclusive and mutually respecting state sovereignties was only ever partially honoured. The modern world has seen many waves of imperialism, and much resistance to claims of self-determination by subaltern communities and other nationalist movements. Indeed, sovereignty has often been invoked to frustrate rather than promote equal standing between political communities. It has been used cynically by established states either to justify their non-recognition or suppression of other national movements or to resist interference by those who might protest against their internal or external abuses of power. Yet even as a heavily qualified good, and one disproportionately enjoyed by Western powers, the 1776 Declaration envisaged and inspired a system of global authority that was coherent in its own terms. It supplied a language and

logic of justification that was not merely conservative of existing authority, but could also be used by many embryonic polities in pursuit of constitutional self-determination.

If the 'high modern' world ushered in by the 1776 Declaration emphasised universality of form, comprehensiveness of authority, and mutual exclusivity of claims, the 'late modern' world in which contemporary claims to independence are articulated in Scotland and elsewhere looks quite different. While the state remains the focus of political organisation, it is now merely first amongst equals. In place of a universal and uniform template of sovereign statehood we have a highly differentiated global mosaic of legal and political capacities. In place of internal sovereignty as comprehensive and monopolistic, authority is typically partial – distributed between various political sites and levels, states and otherwise. And in place of mutual exclusivity as the default condition of external sovereignty, we have overlap, interlock and mutual interference.

Why and how so? No single 'x' factor explains the ongoing movement from universality, comprehensiveness and mutual exclusivity to differentiation, partiality and overlap. Rather, there is a combination and accumulation of forces. Some tendencies challenge states and their borders as effective containers of power. The long post-war development of transnational markets, communication media and cultural forms, has gradually eroded the material capacity of the nation state as the axis of economic power and political authority, and, to a lesser extent, its symbolic locus as the core of political identity. Institutional responses to these changes have underscored the state-decentring trend. Globally inclusive entities such as the United Nations and exclusive groupings such as the G8, as well as regional institutions like the EU, have both tracked and reinforced the development of forms of collective action and public goods (and 'bads') beyond the state. Their remit ranges far and wide, from the provision of security to the protection of human rights, and from the making of transnational markets to market 'correction' in spheres as diverse

as food safety, environmental protection, energy efficiency and criminal justice co-operation. Overlapping these umbrella institutions there is a dense network of powerful, functionally specialist transnational organisations, from state-controlled public bodies such as the World Trade Organisation and the International Atomic Energy Agency, through hybrid public/private entities such as the Internet Corporation for Assigned Names and Numbers, to purely non-state organs such as the International Olympic Committee.

Alongside these global and transnational tendencies, other disturbances to the authority of the state emanate from below. Ironically, the seeds of this challenge to the modern system were sown in the foundational American settlement. As well as the first modern state, the United States was also the first mature federation. It gave novel constitutional form to the idea of territorially distributed power *within* the polity. However, it did so in a way which - even if it required a Civil War to settle the matter definitively - understood the allocation of jurisdiction between federal government and provincial or 'state' institutions as an *expression* of the sovereign authority of the United States as an integrated whole rather than as an internal *challenge* to its integrity.

Federalism, US-style, was designed and rolled out in a particular way, involving a clear division between the two levels of authority and their respective policy spheres, a high degree of ethnic or cultural homogeneity between the different state units, and uniform and symmetrical legal and institutional treatment of these units. Contemporary federalism, or quasi-federalism, has gradually departed from that classical norm. Most newer federations, such as Germany, are 'co-operative' rather than 'dual' arrangements, involving a significant degree of policy overlap and institutional interlocking between central and local levels. Many, such as Canada, Spain or Belgium, are also multinational or multiethnic rather than merely territorial compacts, with some constituencies retaining aspirations towards stronger forms of constitutional recognition. And these multinational or multiethnic federations tend, in addition, towards uneven or asymmetrical treatment of their provinces; those with the clearest or most longstanding traditions of distinctiveness, or the strongest claim to national identity, are accorded more ample recognition of

cultural goods such as language or religion, greater regional governmental autonomy, or disproportionate influence at the federal centre. All these factors combine to create a looser and more fluid political form, challenging the earlier conception of the federal state as a mere variation of the 'sovereigntist' ideal of a well ordered and permanently settled unity.

So when considering the overall challenge to the universality, comprehensiveness and mutual exclusivity of the modern state system we must look to both flanks - to pressures from the substate interior as well as from the transnational beyond. Furthermore, the two dynamics feed off one another. Claims to substate national recognition or protection are powerfully sponsored through global mechanisms for the promotion of individual or collective rights, while supranational institutions such as the EU provide a scale of policy and economic support which makes the ambition of greater regional autonomy within existing states more viable. By the same token, just because existing states have gradually ceded authority and capacity upwards to other territorial or functional institutions, they may become less attractive magnets for substate nations and less well equipped to maintain their sovereign integrity.

## **2. The Spectrum of Scottish self-government**

How does this shifting geopolitical landscape illuminate the stakes and prospects in the Scottish independence debate? I begin with a series of outline propositions.

Under the 2012 Edinburgh Agreement, with its commitment to a single referendum question in 2014, the Scottish debate has now been firmly constitutionally coded in the familiar binary terms of high modernity - a straight choice between staying put in one sovereign state or going it alone in a new one. Yet, as the caution and delicacy with which both sides have sought to position themselves in the debate only serves to make clear - not least, ironically, on account of their shared tendency to deflect scrutiny of their own stance by exposing the fragilities and uncertainties of the other side - the underlying situation is more complex. Our islands are far from immune from the



forces sketched above. In fact, the factors reshaping the geopolitical landscape towards a more varied range of polities exhibiting more restricted and more heavily overlapping forms of authority and capacity apply with particular force in our local context. The claims of comprehensiveness and autonomy associated with internal and external sovereignty are available neither to those who would argue for the retention of Scotland within the British state nor to advocates of Scottish independence. In the words of my title, any solution that retains Scotland as part of an 'interdependent' United Kingdom is still likely to be a relatively 'independent' solution - one permitting Scotland a significant degree of self-government and distinctive voice. Conversely, any solution that recognises Scotland's 'independent' statehood is nevertheless apt to retain a high level of 'interdependence' with the rest of the UK, the EU and the broader network of global institutions. Rather than categorical opposites, therefore, we are faced with a graduated range of possibilities clustered along a narrower spectrum.

This invites a number of conclusions. To begin with, it explains why, for all the early reluctance of the protagonists to commit themselves, the Scottish constitutional debate cannot avoid intricate questions of institutional architecture and policy content. What independence, or its absence, entails, and where its threshold lies, requires *respecification*, and detailed argument will be important in making the popular and political case for or against independence.

If the premium on institutional design and policy content is unsurprising and has been widely anticipated, two further implications of the spectral character of the constitutional debate are less well appreciated. In the first place, for all that the debate is geared towards constitutional settlement, the absence of bright-line solutions together with the broader unpredictability of constitutional politics in a multi-level, interlocking context means that we are likely to remain in a state of constitutional *unsettlement* for the foreseeable future. In the second place, as one special feature of unpredictability and uncertainty, the tendency towards less sovereigntist solutions is bound to alter the symbolic politics of constitutional identity in ways we cannot yet fully imagine. We are entering a phase where the psychology of political belonging and self-identification must

confront a long-term shift in the availability, distribution and combination of the practical means of individual and collective self-determination.

Let me now develop these points more fully.

*(a) the changing environment of the Scottish debate*

Why is the Scottish constitutional debate particularly susceptible to the various trends discussed above? Partly this has to do with the global situation of the United Kingdom, partly with the European context, and partly with the specific historical position of Scotland relative to the rest of the UK.

In global terms, the post-imperial UK, though widely understood to be in long-term decline, retains a relatively strong economic, cultural and diplomatic presence. In a world of increasing variety and interconnectedness of political forms and of ever denser transnational regulation, however, such strength does not manifest itself as independence from global networks. External sovereignty today involves more, not less, involvement with other authority systems, and the restrictions as well as the opportunities associated with such involvement. Britain's permanent seat in the UN Security Council, for example, or membership of the G8, or recognition as one of five 'nuclear weapon states' under the Nuclear Non-Proliferation Treaty, both reflect and underscore its international standing and influence, as well as the constraints associated with collective engagement.

In regional terms, the European continent is one where classical understandings of sovereignty - internal and external - have become more generally transformed over the last half century. Like all member states of the supranational EU - originally Six but rising to Nine with British accession in 1973 and now to 28 in 2013 - the UK has conceded to the demands of the common European market all domestic control and external Treaty authority over the circulation of the factors of production - persons, goods, services and capital - and over much of the broader regulation of commerce. Increasingly, the EU institutions - Council, Commission, Parliament and Court of Justice - have also acquired jurisdiction in other, more or (increasingly) less market-related

areas as wide-ranging as the environment, public health, energy and internal and external security. In a context of gradual integration, reinforced by a common regime of human rights protection in the wider framework of the Council of Europe, all members of the EU - even one as notoriously semi-detached as the UK - are experiencing the synergies and compromises, the accommodations and conflicts of multi-level governance more than any other region at any point in modern history.

As regards the internal UK context, our comparative reference point is the versatile model of federal authority. Yet so evolved rather than designed, so uneven rather than symmetrical, and so fluid rather than fixed has been the development of devolved power to Scotland and the other nations of the UK, that it would be a stretch too far to describe the resulting pattern in federal terms at all. Some prefer the older language of 1707 in characterising the UK as a "Union state" (Rokkan and Urwin, 1982) - comprising once distinct and still distinguishable nations, and required for its survival to continue nurturing some of these diverse institutional and cultural roots and the aspirations associated with them. The accommodation of diversity in the deep political culture is reinforced by the absence of the kind of settled constitutional blueprint we associate with the nominate federal tradition. Instead of a rigid frame in which both floor and ceiling of devolved authority are set in stone, we have a long, twisting, gradually accelerating and still open-ended narrative. This has embraced post-Union retention and selective cultivation of a distinctive Scots law and home-grown educational and religious institutions, a longstanding and gradually extended commitment to administrative devolution, the eventual establishment of a Scottish Parliament in 1999, and now, the introduction of a successor Scotland Act 2012 which foresees significantly extended fiscal powers to complement legislative and executive autonomy.

These factors combine to suggest that the choice between remaining in the UK and becoming an independent state cannot be well understood in classically binary sovereigntist terms. Even from a perspective of purely Scottish self-interest, the question of advantage becomes one of fine and shifting balance; between, on the one hand, remaining absorbed within the authority of a larger state, and all that implies in terms of a sacrifice of some decisional autonomy for sustained

influence and capacity as part of the larger unit, and, on the other hand, full sovereign independence, and all that implies in terms of a sacrifice of some forms of influence and capacity for greater decisional autonomy in pursuit of national interests and aspirations.

The complexities of the new constitutional options, and the weighing and balancing involved, are profound indeed. As the global and European picture makes clear, in the presence of an increasingly powerful and intrusive transnational regulatory domain the purchase of influence and capacity at the price of autonomy is not just the lot of the substate nation. It is a price any traditionally sovereign state, the UK included, increasingly must pay in the late modern age - especially if it sits at or near the top table - just as it is a price any nascent state inevitably pays as it seeks to join the international community. And compounding the complexity, in our particularly fluid local environment, the underlying conceptual distinction between interdependence and independence appears ever fuzzier at the margins. Devolution in the Union state can be stretched to include significant autonomy from the central political system, just as independence, as we shall see, can be qualified to allow a wide range of continuing interdependencies with the rest of the UK and beyond.

*(b) redefining independence*

Ever since the publication by Scotland's first SNP government in 2007 of *Choosing Scotland's Future* - announcing a "national conversation" on Scotland's constitutional outlook and setting the tone for the party's subsequent strategy - the nationalist movement has sought to define independence in a manner which takes considerable distance from the sovereigntist certainties of high political modernity. Externally, membership of the EU is fully embraced, and this automatically implies continued common UK regulation in many areas. Participation is also sought in key global organisations such as the Commonwealth, the World Health Organisation, the Organisation of Economic Co-operation and Development, the World Trade Organisation, and - in a recent change of policy - the North Atlantic Treaty Organisation. More tellingly, even within the ambit of the British Isles the nationalist approach emphasises continuity with certain lateral

constitutional initiatives of recent years. Both the Joint Ministerial Committee framework, which provides for the various governments of the United Kingdom to work together, and the British-Irish Council, established in 1998 under the auspices of the Good Friday Agreement for co-operative amongst all the executives of the two states, are endorsed as vital confederal supports for a newly independent Scotland rather than banished as relics of an outmoded settlement. Accordingly, while formal international sovereignty - the idea of a separate voice and seat in global affairs - is insisted upon as one non-negotiable fundamental of independence, much of that sovereignty is then to be re-pooled or re-mixed in the name of collective action or co-ordinated policy.

Even more striking is the willingness to countenance continuing UK influence over certain traditional areas of internal sovereignty. The 2007 prospectus launched the idea of a "social Union", and subsequent debate has suggested this may extend to a common British platform of social welfare. Defence and the retention of a sterling currency Union - the latter revived in light of the diminishing attractiveness of the Euro - are two other high profile areas where the longstanding, complex intertwining of policy has provoked consideration of the continued pooling of resources and competences. In other areas, too, such as the media and immigration, the manifest and manifold cross-border and broader transnational policy 'externalities', recognised and reinforced by the tightening grip of common EU regulation, argue in favour of the retention of a common policy front.

From the Unionist side, conversely, we observe a willingness to push out the devolutionary boat - to 'define down' what is required by way of policy, institutional or fiscal commonality to retain the integrity of the United Kingdom. The Calman Commission, which reported to broad Unionist agreement in 2009, and which provided much of the impetus behind the 2012 Scotland Act, is one example. And while the different Unionist parties have been unwilling, either in their 'non-discussion' of a possible third referendum option or as a more general forward-looking initiative, to put their support behind a common conception of 'devo-max', each Party is committed to bring forward its own proposals for further constitutional reform.

And so the constitutional debate, deprived of sharp sovereigntist definition, moves towards a crowded middle. This opens up two key areas of contestation. One concerns the attractiveness and plausibility of the different alternatives. If the nationalists cannot simply point to the purity of the Promised Land, then, as already noted, they must make the case for a deliverable package that strikes an optimal balance between decisional autonomy and retention of capacity and influence. Likewise, if the Unionists concede that the *status quo* is not ideal, they must argue for a similarly optimal and deliverable solution from their end of the constitutional spectrum. A related controversy - one that will grow in significance as the referendum approaches and questions of definition come to the fore - concerns the authenticity of the self-positioning on the spectrum of the sponsors of each approach. Is the case for a heavily qualified form of independence still nevertheless a case for independence, or is it a case of false pretences? Equally, is the pitch for a heavily qualified form of Unionism still nevertheless a pitch for the UK, or is it simply a fig-leaf - a refusal to acknowledge a process of inexorable drift and dissolution? In a world of eroded and interlocking sovereignties there is no objective 'fact of the matter', no neutral test to determine whether or not this or that position is 'really' one of independence or 'truly' and stably Unionist. There are only the more or less persuasive arguments of either side that their position is both attractive and plausible in its own terms and can make genuine claim to the inheritance of the ideal of independence on the one hand or the legacy of the Union on the other.

*(c) towards constitutional unsettlement*

It is true but trite to say that we live in unsettled constitutional times. The referendum debate will stretch over two years, and regardless of how the vote goes, there will be various consequential moves, either to further reform and consolidate the Union or to enter and conclude formal negotiations for the severance of the Union and develop an indigenous Scottish Constitution. These will throw up many additional matters of dispute and will take years to resolve. Beyond the obvious, however, there are other factors which suggest unsettlement is not simply a passing incident of a significant constitutional moment, but a deeper condition of our new geopolitical age.

In part, this is due to the disappearance of categorical constitutional answers in the changing climate. Faced no longer with a binary choice but with a continuum of constitutional options, it is less likely that the Scottish and British people will treat any particular resting point on that continuum as decisive. Politicians may talk as if we are in the constitutional end game. They may even hope or believe it to be so. But the lack of clear red lines in the debate and the continuing availability of incremental adjustments, together with the fact that solutions at the indistinct margins between independence and interdependence can be interpreted differently on either side, means that both the opportunity and the political energy and motivation for constitutional re-engagement are likely to persist.

In part, however, unsettlement is also a matter of complex interdependence, and the multi-actor and multi-level quality of new constitutional processes and sequences. Where bright-line solutions are unavailable and constitutional arguments are likely to turn on the relative attractiveness and plausibility of differing calculations of the balance between autonomy, capacity and influence, the ability to develop a compelling narrative of constitutional sustainability or progress is at a premium. Yet, when all constitutional projects become vulnerable to forces and agent beyond the control of their authors, precisely this kind of narrative confidence can prove elusive.

The EU is an obvious case to illustrate my point. The last months of 2013 witnessed controversy over how and on what terms an independent Scotland might retain or resume its membership of the supranational club. Yet the debate proved inconclusive. Even after the intervention of the European Commission, it remained uncertain whether an independent Scotland should have continuing membership alongside the rest of the UK, or whether Scotland would have to re-apply like any new candidate, either because it would be deemed to have seceded from the larger UK entity or, more radically, because the UK itself would be treated as dissolved - in which case each successor state would have to rejoin. This lack of clarity stems from the fact that, as with so many constitutional conundrums of a post-sovereigntist age, we are entering virgin territory.

There is no precedent for the devolved part of an existing EU state becoming independent, and no definitive answer to be drawn from historical practice. What *is* absolutely clear, however, is that Scottish independence would require substantial renegotiation of the terms of EU membership. Questions of representation in European institutions, of budgetary contribution, of participation in the programme of justice and home affairs, and, of course, of membership of the Euro, would have to be addressed anew, as would many other important issues. Whether done in the context of the accession negotiations of a new state, or through the amendment of longstanding Treaty agreements amongst existing states, tough choices would have to be made and difficult compromises struck. Certainly, there would be no unilateral right for Scotland to dictate terms, regardless of whether their international law position was treated as one of new or of continuing membership. Whichever route was taken, the terms of Scotland's membership would depend on what all existing members could be persuaded to accept - including members such as Spain concerned about secessionist movements in their own sovereign backyard.

Yet if this speaks to a near future of profound uncertainty, matters look not dissimilar from the other side of the debate. In a context of rising Euroscepticism in and beyond the Conservative Party, the prospect looms of a referendum in the next Parliament, whether on retention of core status or, as seems ever more likely, on the very principle of continuing UK membership of the EU. The outcome of such a referendum is difficult to call. If a favourable vote depends upon a looser compact, there is no guarantee that the EU will be receptive to negotiation, and even if the UK renews its European vows the vicissitudes of the Euro over the last three years remind us that European membership, even on favourable terms, is hardly today a condition of copper-bottomed stability.

What is true of the EU is also true of other exclusive international organisations such as the Security Council, or the G8, or the Nuclear Club. Given the volatility of many such international regimes, the constitutional projection is one of uncertainty on both sides of the question. The



stubborn prospect of multi-faceted constitutional unsettlement, therefore, is one that afflicts all positions, and which is emerging as one of the defining conditions of the debate

*(d) Reframing political identity*

Sovereign statehood, typically endorsed in a foundational constitutional text, has traditionally supplied not only a vehicle of authority but also a focus of political identity. It expresses and affirms the self-determining status of a community of affinity. But what becomes of the identity dimension of constitutional statehood when its accompanying authority, as a matter of both fact and prospect, becomes divided, qualified, pooled or is otherwise rendered precarious in the ways discussed above? If state sovereignty is not what it used to be, what does that imply for the aspirations of political belonging and self-realisation of those who either do or do not identify with that state? Translated into local terms, if political authority in these islands is now split and shared between and beyond their various seats of government, and will continue to be regardless of whether the Scottish pathway stops at 'independent interdependence' or proceeds towards 'interdependent independence', does this alter how constitutional self-government is likely to be perceived and pursued as a badge of political identity?

Two contrasting possibilities suggest themselves. One would envisage the expressive dimension of nationalism declining in importance, while the other would see its importance elevated. From one viewpoint, identity should track and shadow actual political capacity and influence. In that perspective, the diffuse quality of political authority is likely to be reflected in the multi-layering of political identity and belonging. - a tendency encouraged by the fact that a majority of Scots already embrace dual British and Scottish identities. Scottish independence, from such an angle, would become ever less a vindication of a categorical sense of political identity. It would be pursued, if at all, primarily on the basis of an instrumental calculus - as a platform for better achieving the optimal mix of autonomy, capacity and influence on behalf of a preferred (but, for many, not exclusive) community of attachment than would be available from a UK point of departure.

From the other viewpoint, the symbolic affirmation of a *distinctive* political identity might instead come to operate in inverse relation to the *indistinctive* character of multi-level, interlocking authority. It may become more important, either as a reaction against the compromised possibilities of self-government, or, at least, as a form of cultural compensation for the trend towards global interdependence.

That the contemporary SNP has consistently stressed the instrumental worth over the cultural expression of political nationalism is underlined by its recent emphasis upon the continuing importance of the bonds of Britishness, and its affirmation of a residual Union - both social and monarchical. Yet nothing is simple in the politics of identity. Any conception of political nationalism, in truth, needs both dimensions - instrumental and expressive - to operate in close tandem. It does so if it wishes to avoid becoming either a claim to authority that cannot be won, or even if won, cannot be fully exploited, because it lacks the mobilising power of strong collective identity; or, conversely, an insular culture of frustrated common destiny. This has often been a difficult balance for nationalist movements and projects to find and sustain. In today's constitutional politics, the relationship between the two dimensions, given the divergent tendencies just described, may become more volatile, more difficult, less easy to predict or to cultivate.

An unsettled Scottish constitutional prospectus, in conclusion, is not only the product of the realignment of local and global forces into a more complex and less predictable pattern of political authority. It is also a matter of deep political culture. For in consequence of that realignment of authority, the very meaning of nationality as a primary frame of political identity, and the very significance of the constitutional form of self-expression as the symbolic link between the two, no longer readily conform to earlier understandings.

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